IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-825

INSILCO BROADCASTING CORPORATION, *et al.*,
Petitioners,

v.

WNCN LISTENERS GUILD, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

B. DWIGHT PERRY
RICHARD DANIEL MARKS
DOW, LOHNES & ALBERTSON
1225 Connecticut Avenue, N.W.
Suite 500
Washington, D.C. 20036
(202) 862-8000

Counsel for Insilco Broadcasting Corporation, et al.

INDEX

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No.

INSILCO BROADCASTING CORPORATION, *et al.*,
Petitioners,

v.

WNCN LISTENERS GUILD, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Insilco Broadcasting Corporation, *et al.*,[1] respectfully petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit to review that court's judgment, entered June 29, 1979, in *WNCN Listeners Guild v. FCC*, No. 76-1692, which was decided

---

[1] Insilco Broadcasting Corporation, Insilco Broadcasting Corporation of Louisiana, Inc., Insilco Radio of Oklahoma, Insilco Broadcasting Corporation of Oklahoma, Inc., McClatchy Newspapers, Newhouse Broadcasting Corporation, Palmer Broadcasting Company, Plough Broadcasting Company, Inc. (The Insilco companies formerly were named Covenant Broadcasting Corporation, Covenant Broadcasting Corporation of Louisiana, Inc., Covenant Radio of Oklahoma, and KTOK Radio, Inc., respectively.) Petitioners are all broadcast licensees.

together with *Classical Radio for Connecticut v. FCC*, No. 76-1793, and *Office of Communication of the United Church of Christ v. FCC*, No. 77-1951. Petitioners intervened in support of the respondents in No. 76-1793 and participated as a party before the court of appeals. We understand that the Federal Communications Commission and the United States of America, the National Association of Broadcasters, the Columbia Broadcasting System, Inc., and the American Broadcasting Companies, Inc., are also petitioning for certiorari to review the court of appeals' decision.

OPINIONS BELOW

The court of appeals' opinion, FCC App. A,[2] has not yet been officially reported. The Federal Communications Commission's Notice of Inquiry, FCC App. C, is reported at 57 F.C.C.2d 580 (1976); its Memorandum Opinion and Order, FCC App. D, is reported at 60 F.C.C.2d 858 (1976) (the "*Policy Statement*"); and its denial of reconsideration, FCC App. E, is reported at 66 F.C.C.2d 78 (1977).

JURISDICTION

The judgment of the court of appeals was entered on June 29, 1979, FCC App. B. On September 21, 1979, Mr. Chief Justice Burger signed an order extending the time for filing this petition to November 26, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

---

[2] As noted above, the Federal Communications Commission and the United States of America have petitioned for a writ of certiorari to review the court of appeals' decision. The opinions below are included in the Appendix to the government's petition and are cited here as "FCC App."

QUESTIONS PRESENTED

This case involves a decision by the court of appeals requiring the Federal Communications Commission (the "Commission") to intervene in selected cases when radio broadcasters change their program formats. The questions presented are:

1. Whether the court of appeals ignored this Court's repeated instructions and improperly substituted its own policy mandating radio format regulation for the Commission's expert determination that format regulation is impractical and unnecessary to serve the public interest.

2. Whether the court of appeals' insistence on Commission oversight of radio format decisions ignores First Amendment considerations, explicated in this Court's decisions on access to broadcast facilities and on "less drastic means," thus upsetting the delicate constitutional balance required of all regulation touching program content.

3. Whether the court of appeals ignored important legislative history in erroneously deciding that the Communications Act mandates Commission regulation of radio formats.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the Constitution of the United States provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Sections 309(a) and (e) of the Communications Act of 1934, as amended, 47 U.S.C. §309(a) and (e), provide:

> "(a) Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.
>
> (e) If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the ground and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. When the Commission has so designated an application for hearing, the parties in interest, if any, who are not notified by the Commission of such action may acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for their interest not more than thirty days after publication of the hearing issues or any substantial amendment thereto in the Federal Register.

Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate. The burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant, except that with respect to any issue presented by a petition to deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission."

Section 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §310(d), provides:

"(d) No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby. Any such application shall be disposed of as if the proposed transferee or assignee were making application under section 308 for the permit or license in question; but in acting thereon the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee."

Section 326 of the Communications Act of 1934, as amended, 47 U.S.C. §326, provides:

"Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no

regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication."

Sections 396(a)(1), (3) and (5), and (g)(1)(A) of the Communications Act of 1934, as amended, 47 U.S.C. §396(a)(1), (3) and (5), and (g)(1)(A), provide:

"(a) The Congress hereby finds and declares that—

(1) it is in the public interest to encourage the growth and development of public radio and television broadcasting, including the use of such media for instructional, educational, and cultural purposes;

(3) expansion and development of public telecommunications and of diversity of its programming depend on freedom, imagination, and initiative on both local and national levels;

(5) it furthers the general welfare to encourage public telecommunications services which will be responsive to the interests of people both in particular localities and throughout the United States, and which will constitute an expression of diversity and excellence. . . .

(g)(1) In order to achieve the objectives and to carry out the purposes of this subpart, as set out in subsection (a), the Corporation is authorized to—

(A) facilitate the full development of public telecommunications in which programs of high quality, diversity, creativity, excellence, and innovation, which are obtained from diverse sources, will be made

> available to public telecommunications entities, with strict adherence to objectivity and balance in all programs or series of programs of a controversial nature. . . ."

STATEMENT OF THE CASE

This case presents a conflict over the regulatory policy that the Federal Communications Commission must follow whenever a radio station seeks to change its entertainment format in the face of opposition from members of the public. Intertwined with this issue are basic questions concerning the Commission's legislative role in formulating regulatory policy and the scope of the court of appeals' policy review. Significant interpretations of the Communications Act of 1934 and of the First Amendment are integral to these questions.

Commercial and noncommercial radio stations compete for listeners by broadcasting music and informational programs in different combinations. The precise mix of program material, performers and method of presentation is unique to each station. Most adjust their selection of program material in order to respond to the desires of the listening audience, and various groups within it, for particular music and information. The radio marketplace is dynamic, responding to constantly changing listeners' preferences.

No precise definition of a radio "format" exists. Indeed, the elusiveness of the term "format" lies at the center of this case. Virtually any of the definitions favored by the Commission, the court of appeals or the litigants in this proceeding use highly subjective terms and widely different schemes for classifying different combinations of music and informational programming.

For many years radio stations changed their programming at will, in mid-license or in connection with a change of ownership, without interference from the Commission or courts. However, beginning in 1970, audience groups challenged licensees' format changes in a series of cases at the Commission and the United States Court of Appeals for the District of Columbia Circuit.[3] The cases culminated in *Citizens Committee to Save WEFM v. FCC*, 506 F.2d 246 (D.C. Cir. 1974) (*en banc*), in which the court of appeals consolidated its previous format decisions and established guidelines for the Commission's consideration of future disputed format changes.

In *WEFM* the court of appeals concluded that the "public interest, convenience, and necessity" standard[4] of the Communications Act requires the Commission to intervene when a proposed transferee of a radio station contemplates abandoning a so-called "unique" format. To vindicate this implied concern for diverse entertainment programming, the court required the Commission to consider the net loss of diversity in situations where a format was to be abandoned in the face of significant "public grumbling."[5] The court insisted the Commission consider whether an adequate substitute for the format existed, and whether the format could be maintained economically

---

[3] *Citizens Comm. to Keep Progressive Rock v. FCC*, 478 F.2d 926 (D.C. Cir. 1973); *Lakewood Broadcasting Serv., Inc. v. FCC*, 478 F.2d 919 (D.C. Cir. 1973); *Citizens Comm. to Preserve the Voice of Arts in Atlanta v. FCC*, 436 F.2d 263 (D.C. Cir. 1970). *See also Hartford Communications Comm. v. FCC*, 467 F.2d 408 (D.C. Cir. 1972).

[4] This is the standard prescribed in Section 309(a) of the Communications Act, 47 U.S.C. §309(a).

[5] 506 F.2d at 261.

in the market.[6] Economic feasibility was not to be measured simply by the economic performance of the station and format in question; rather the inquiry extended to whether the station was efficiently managed and, if not, whether a better managed station would make money using that format.

If a substantial question of fact existed with respect to these considerations, the Commission was to hold an evidentiary hearing. A hearing was also necessary if any element of the court of appeals' test was established. For example, if a station proposed to abandon its format and no other station in the market offered "a reasonable substitute," then a hearing was necessary to determine whether abandoning the format in that market comported with the public interest.[7]

Following the decision in *WEFM*, the Commission issued a notice of inquiry[8] to explore adopting a comprehensive policy for radio format changes to replace the case-by-case development to that point. The Commission was frankly concerned with the practical difficulties of implementing *WEFM* in a sensible way, and with the likelihood that even vigorous implementation would be of little value to the "public interest" as the Commission perceived it. The Commission was also gravely worried about constitutional difficulties that seemed to pervade the court of appeals' approach.

After comments and replies were received the Commission issued the *Policy Statement*,[9] announcing that it would no longer intervene to block format changes. The Commission concluded that classifying radio program-

---

[6] *Id.* at 262, 264-266.
[7] *Id.* at 264-65.
[8] FCC App. C.
[9] FCC App. D.

ming in categories—whether relatively broad or narrow—was of little value. Comments, supported by a Commission staff study, showed that any format classification system was largely arbitrary, and that listeners apparently perceived as much difference between stations within the same format category as they did between stations in different categories.[10]

The Commission could not discover any consistent way to measure differences in the intensity of audience preferences for various formats. Therefore it could not determine a net public interest gain or loss resulting from the replacement of one format by another.[11]

The Commission found that the marketplace was already providing great diversity of program service throughout the country. Minority groups—whether defined by age, economic status, education or race—are not guaranteed tailor-made service in a particular area. But no such guarantees are possible. If a format appeals to one group, then other groups in the same market are probably unserved or underserved to some degree. The Commission also concluded, relying in part on this Court's interpretation of the Communications Act in *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470, 474 (1940), that Congress intended radio broadcasting to be governed by the marketplace.[12]

On review *en banc*, the court of appeals invalidated the Commission's policy of not interfering in radio licensees' format decisions. The court held that the Commission could not formulate a new regulatory approach to format changes because of the earlier decision in WEFM.[13] It was

---

[10] FCC App. D 129-30a.
[11] FCC App. D 129-30a.
[12] FCC App. D 122-24a.
[13] FCC App. A 40a.

unconvinced by the attempted distinction between its case-by-case approach to formats and the Commission's reexamination of the whole area as part of its "basic legislative mandate":[14]

> We should have thought that *WEFM* represents, not a *policy*, but rather the *law* of the land as enacted by Congress and interpreted by the Court of Appeals, and as it is to be administered by the Commission . . . .
>
> *WEFM* was an interpretation of a statute applicable to an adjudicatory proceeding and, to this extent, was a decision in which the judicial word is final. That decision was based on an interpretation of the Communications Act.[15]

The court found the Commission's analysis flawed, and advanced its own "common sense"[16] approach to format regulation as more authoritative. The court in effect also modified *WEFM* by explaining that administrative oversight of format changes was intended to be a supplement to the market's influence on formats, not a substitute. Commission intervention in disputes over format changes was only necessary, according to the court, "when there is strong prima facie evidence that the market has in fact broken down."[17]

The court of appeals was sanguine about the efficacy of administrative format regulation because most prior format disputes have been settled rather than fully litigated.[18] The court apparently did not recognize the likeli-

---

[14] FCC App. D 119a.
[15] FCC App. A 32-33a (emphasis in original).
[16] FCC App. A 37a.
[17] FCC App. A 24a.
[18] FCC App. A 18-20a, 25a.

hood that the expense and delay of litigation, which prompted the need for settlement, deterred licensees' freedom of choice in selecting program content and deprived listeners of the benefits of programming selected through the marketplace rather than by government fiat.

The court gave little attention to arguments that Commission oversight of formats was contrary to the legislative history of the Communications Act,[19] that it violated the First Amendment as applied to broadcasting,[20] and that the court's rejection of the *Policy Statement* exceeded its powers of review as explained in *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978) (hereafter "*NCCB*"). The court of appeals also criticized the Commission's rationality and impartiality in issuing the *Policy Statement*. The court was particularly aggravated by the Commission's reliance on a staff study that the court felt had not been made available at a sufficiently early stage for adversarial comments. The court also was unconvinced by the study's statistical analysis.[21]

Judge Tamm, joined by Judge MacKinnon, dissented on the ground that the majority was substituting its policy preference on a judgmental or predictive matter in violation of the mandate of *NCCB*.[22] Judge Tamm agreed with the Commission that "unique" formats could not adequately be distinguished from "non-unique" formats (a major point in the Commission's *Policy Statement*),[23]

---

[19] FCC App. A 26-27a, n.37.
[20] FCC App. A 33a.
[21] FCC App. A 14-17a.
[22] FCC App. A 55a.
[23] FCC App. A 50-51a.

and that the Commission could not reliably measure audience preferences for different formats.[24]

In a separate opinion, Judge Bazelon concurred on the ground that the Commission had not made its staff study available for public comment sufficiently early in the rule making below.[25] However, he carefully noted his general agreement on the merits with Judge Tamm's dissent, and he criticized the majority for failing "to grapple seriously with the constitutional implications of its decision."[26]

REASONS FOR GRANTING THE WRIT

The United States Court of Appeals for the District of Columbia Circuit—the sole reviewing court of most Commission decisions[27]—has established a regime that departs strikingly from Congress' plan to delegate its regulatory authority over radio broadcasting to the Commission and to leave program decisions to market forces. The opinion below will require governmental intervention in decisions concerning program content on radio to an extent inconsistent with the First Amendment as construed by this Court. Consequently, the case presents important statutory and constitutional questions affecting an industry which reaches most citizens of the United States.

---

[24] FCC App. A 51-53a.

[25] FCC App. A 41a.

[26] FCC App. A 41-42a.

[27] This court of appeals' exclusive jurisdiction to hear appeals of Commission orders relating to the licensing of broadcast stations is provided by Section 402(b) of the Communications Act, 47 U.S.C. § 402(b).

I. The Court of Appeals Has Disregarded The Clear Instruction of This Court and Has Impermissibly Substituted Its Judgment for That of The Commission in Policy Matters Which The Congress Has Entrusted to The Special Expertise of The Agency.

This is the third in a series of cases in which the court of appeals has substituted its own policy judgments on the regulation of broadcasting for those of the Commission. Although the court of appeals' scope of review was defined in *NCCB* and *CBS v. Democratic National Committee*, 412 U.S. 94 (1973) (hereafter "*DNC*"), the court insists upon its own predictions and judgments about the nature and importance of diversity in the radio marketplace, and disdains those of the Commission. This distorts the relationship between a major regulatory agency and its reviewing court, depriving the Commission of the flexibility it needs to fulfill the role assigned by Congress.

The court orders the Commission to consider "loss of diversity,"[28] even though the Commission disclaims the ability to perform that analysis rationally. The court also orders the Commission to judge whether certain formats are "unique" in particular markets, even though the Commission says it lacks this predictive capacity.[29] Just a year after this Court's opinion in *NCCB*, the court below insists on retaining a judicial picture of diversity thoroughly at odds with the Commission's view of the broadcast marketplace. The opinion below and *NCCB* cannot stand together.

In *NCCB* the same court of appeals had overturned portions of the Commission's rule making on newspaper-broadcast cross-ownership, an area (like the present case) where Congress delegated "broad authority to the Commission to allocate broadcast licenses in the 'public inter-

[28] FCC App. A 5a.
[29] FCC App. A 30-31a.

est.' "[30] The court had substituted its judgment for the Commission's on the importance of diversity of media cross-ownership, and imposed a more stringent policy requiring divestiture of certain cross-owned properties. This Court forcefully disagreed, holding that Congress committed "the weighing of policies under the 'public interest' standard"[31] to the Commission, which was entitled to give greater force to best practicable service than to diversity of ownership.[32]

In reinstating the Commission's policy in its entirety, this Court looked to whether the Commission had been arbitrary or capricious in failing to proceed rationally or in not considering the relevant factors. This Court stressed that judicial review, while it must be "searching and careful," does not empower a court " 'to substitute its judgment for that of the agency.' "[33]

NCCB is a striking parallel to the present case. The Commission here developed a full record on radio formats, found facts and made a "legislative-type" judgment[34] that leaving format decisions to broadcasters, subject to market forces, is the most effective means of achieving an acceptable level of program diversity under the public interest standard. The Commission reached its conclusions through a rational process and thoroughly explained its reasoning. As in *NCCB*, the subject of radio format diversity involves factual determinations primarily of a judgmental or predictive nature, where complete factual support in the record is neither possible nor

---

[30] 436 U.S. at 795.

[31] *Id.* at 810.

[32] *Id.*

[33] *Id.* at 803, *quoting Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971).

[34] *Cf.* Davis, *Administrative Law of the Seventies* 146 *et seq.* (1976) (distinguishing legislative from interpretive rules).

required, for " 'a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency.' "[35]

A similar parallel is found in *DNC*, where this Court overturned the same court of appeals' conclusion that the public interest standard of the Communications Act required a right of access by non-licensees for editorial advertisements dealing with public issues. This Court held that Congress left such basic policy questions to the Commission to give it the flexibility for experimenting "with new ideas as changing conditions require," and to balance the asserted benefits of regulatory intervention against its undesirable effects.[36]

Deference to the Commission's legislative fact-finding and inferential reasoning is long-standing.[37] Any other approach would fossilize the regulatory framework of broadcasting despite constantly changing market and technological conditions. For example, the Commission has issued a notice of proposed rule making that contemplates deregulating many aspects of radio broadcasting.[38] A quantum reduction in these regulations has been studied for some time, and the Commission may well decide that the public interest would best be served by allowing market forces greater play. Since entertainment formats are the essence of radio broadcasting, any court-developed policy requiring the Commission to monitor format changes, and approve those in dispute, would jeopardize the Commission's ability to conform its regulatory scheme to changing conditions. The court's decision

---

[35] 436 U.S. at 814, *quoting FPC v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 29 (1961).

[36] 412 U.S. at 122-23.

[37] *See, e.g., National Broadcasting Co. v. United States*, 319 U.S. 190, 224 (1943).

[38] *Deregulation of Radio*, 44 *Fed. Reg.* 57636 (October 5, 1979).

below is therefore a potential impediment to a wide range of regulatory goals.

II. The Court of Appeals Has Ignored Applicable Decisions of this Court And Decided an Important Constitutional Question in a Manner Directly at Odds With The Requirements of Those Decisions.

The court of appeals' doctrine of program diversity and format regulation fundamentally conflicts with two lines of cases on the First Amendment decided by this Court. The court below made no attempt to square format regulation with the First Amendment, and a major constitutional misinterpretation will be perpetuated absent guidance from this Court.

Formats are the framework for expression in the radio medium. Format decisions attempt to maximize audience in order to increase the impact of editorials, news and public affairs programming, and to increase the public's exposure to ideas expressed in music or humor. A format is itself a form of expression, in the same way that an anthology is the expression of the editor, or as the selection of news stories constitutes expression by a newspaper publisher.

The court of appeals desires to promote radio service for various tastes that it feels may be underserved. But government attempts to measure public benefit or detriment as to matters of taste—intangibles which are unresolvable in a hearing and unquantifiable by administrative or judicial process—raise serious First Amendment questions.

Under these circumstances, the Court's doctrine of "less drastic means,"[39] provides essential guidance for

---

[39] *See United States v. Robel*, 389 U.S. 258 (1967); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Shelton v. Tucker*, 364 U.S. 479 (1960).

harmonizing First Amendment doctrine generally with regulatory approaches in the broadcast format area. Achieving legitimate governmental goals (such as promoting the public interest in broadcasting),

> cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same purpose.[40]

In *Buckley v. Valeo*, 424 U.S. 1 (1976), the governmental interests were examined to determine their legitimacy and importance. Then, particular means of promoting those interests were weighed against impairment of First Amendment rights, considering alternatives with less adverse impact.

Analyzing format regulation in this way highlights the flaw in the court of appeals' approach. Diversity of service is a legitimate goal under the public interest standard, but it can be achieved with far less intrusion on protected rights. In fact, Congress and the Commission have already provided these alternatives.

Congress decided to achieve diversity in entertainment programming primarily through the marketplace. Congress' primary reliance on market forces to achieve program diversity was an important element in *Sanders Brothers*.[41] The Commission's *Policy Statement* concluded that the market continues to be the most effective means of achieving this aim.[42]

---

[40] *Shelton v. Tucker, supra* n.39, 364 U.S. at 488 (footnotes omitted).

[41] *FCC v. Sanders Brothers Radio Station, supra*, 309 U.S. 470 (1940).

[42] FCC App. D 128a.

Congress has supplemented commercial radio service by enacting legislation to establish noncommercial ("public") radio stations throughout the country for the express purpose of encouraging programming to serve diverse cultural needs.[43] Noncommercial radio is fulfilling the expectation that it can present programming which appeals to small audience groups and is therefore unlikely to be presented by commercial radio.[44] This supplementary role of noncommercial radio stations is growing more sophisticated each year.[45] To the degree that entertainment and informational programming overlap, such as on "all news" stations, the Fairness Doctrine is also a less drastic means to diversity, because the Doctrine accords great scope to licensees' editorial judgments and permits Commission oversight only in very limited circumstances.[46]

Consideration of the Fairness Doctrine also leads directly to the second line of cases that conflict with the court of appeals' holding below. In *Red Lion* and *DNC*, this Court struck a delicate balance between vindicating the

---

[43] *See* Educational Television Facilities Act of 1962, Pub.L.No. 87-447, 76 Stat. 64, *as amended by* Public Broadcasting Act of 1967, Pub.L.No. 90-129, 81 Stat. 365, 367, *and by* Educational Broadcasting Facilities and Telecommunications Demonstration Act of 1976, Pub.L.No. 94-309, 90 Stat. 683 (*codified at* 47 U.S.C. § 390, *et seq.*). *See also* Sections 396(a)(1), (3), (5) and (g)(1)(A) of the Communications Act, 47 U.S.C. § 396(a)(1), (3), (5), (g)(1)(A).

[44] Congress was straightforward in its finding:

> that it furthers the general welfare to encourage public telecommunications services which will be responsive to the interests of people both in particular localities and throughout the United States, and which will constitute an expression of diversity and excellence.... 47 U.S.C. § 396(a)(5) (1978).

[45] *See A Public Trust: The Report of the Carnegie Commission on the Future of Public Broadcasting* 185 *et seq.* (1979).

[46] *See Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367 (1969) (hereafter "*Red Lion*").

audience's right to receive "suitable access to social, political, esthetic, moral and other ideas and experiences,"[47] and "the risk of an enlargement of Government control over the content of broadcast discussion of public issues," which a right of editorial access would have required.[48]

The notion that courts, acting through the Commission, can manipulate formats to assure access for all major aspects of contemporary culture is a close cousin to the theory of editorial access in *DNC*. Both require detailed bureaucratic second-guessing of program decisions. This Court said in *DNC*: "[t]o sacrifice First Amendment protections for so speculative a gain is not warranted, and it was well within the Commission's discretion to construe the Act so as to avoid such a result."[49]

Red Lion and *DNC* are therefore consistent with the "less drastic means" cases. They fortify the conclusion that Congress has selected marketplace forces supplemented by noncommercial radio and, in certain instances, the Fairness Doctrine, to achieve program diversity. The Commission confirms that this approach is more effective than intervention in format decisions. Therefore, the decision below is incompatible with this Court's cases applying the First Amendment to the field of broadcasting.

III. The Court of Appeals Has Failed to Consider Legislative History of the Communications Act Which is Dispositive of The Issues Arising in This Case.

A striking feature of the decision below is the court's general avoidance of legislative history to support the need for radio format regulation to achieve diversity. The

---

[47] *Id.* at 390.
[48] *DNC*, 412 U.S. at 126.
[49] *Id.* at 127 (footnote omitted).

legislative histories of Sections 326[50] and 310(d)[51] actually foreclose the Commission's authority to intervene in broadcasters' format decisions, and the court's misconstruction of the Act threatens to govern all radio broadcasting unless this Court intervenes.

Section 326, which prohibits the FCC from censorship, was enacted in part to prevent the Commission from granting licenses according to priorities based on broadcast content (such as the kind of music to be played).[52] Section 310(d) of the Act was passed to forbid the Commission from interfering in the sale of a broadcast station by comparing the proposed buyer's qualifications—including his programming proposals—with those of any other party, including the existing licensee.[53] Although the court of appeals interpreted Section 310(d) as not forbidding program service comparisons between the buyer and seller[54] (an interpretation that the Commission itself adopted in an earlier case),[55] this is an erroneous reading of the pertinent legislative history.[56]

---

[50] 47 U.S.C. §326.

[51] 47 U.S.C. § 310(d).

[52] *See* H.R. Conf. Rep. No. 1886, 69th Cong., 2d Sess. 19 (1927), relating to Section 29 of the Radio Act of 1927, Pub.L.No. 632, ch. 169, 44 Stat. 1162, the predecessor of Section 326 of the present Act.

[53] H.R. Rep. No. 1750, 82d Cong., 2d Sess. 245-46, *reprinted in* 1952 U.S. Code Cong. & Ad. News 2245-46 (discussing Section 310(b) of the Act, which was recodified as Section 310(d), Pub.L. 93-505, § 2, 88 Stat. 1576).

[54] FCC App. A 26-27a, n.37.

[55] *Wichita-Hutchinson Co.*, 20 F.C.C.2d 584, 586 (1969).

[56] H.R. Rep. No. 1750, 82d Cong., 2d Sess. 245-46, *supra* n.53.

CONCLUSION

For the above reasons, certiorari should be granted.

Respectfully submitted,

B. DWIGHT PERRY
RICHARD DANIEL MARKS
DOW, LOHNES & ALBERTSON
1225 Connecticut Avenue, N.W.
Suite 500
Washington, D. C. 20036
(202) 862-8000

Counsel for Insilco Broadcasting Corporation, et al.